ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 96-261
International Settlement Rates	)	

REPLY COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation on behalf of its affiliated telecommunications companies

Ward W. Wueste
GTE Service Corporation
One Stamford Forum
Stamford, CT 06904
(203)965-2000

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202)463-5200

R. Michael Senkowski
John B. Reynolds, III
Richard T. Pfohl

of

Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

ITS ATTORNEYS

Dated: March 31, 1997

SUMMARY

GTE Service Corporation, on behalf of its affiliated telecommunications companies ("collectively GTE"), supports the Commission's goal of fostering competitive markets in the telecommunications industry. GTE respectfully submits, however, that both the overwhelming opposition to the Commission's Notice of Proposed Rulemaking ("NPRM") and the changing nature of the international telecommunications environment warrant the Commission's reevaluation of its proposed prescription of settlement rates.

Global competition in the telecommunications industry seems a reality, now more than ever, due to the recent signing of the World Trade Organization's ("WTO") global basic telecommunications agreement ("GBT"). This historic and pervasive agreement was signed by nearly seventy countries representing 95% of the world's telecommunications revenue. It requires fundamental changes and commitments that assure an acceleration and expansion of competitive forces which will strongly influence the movement of international accounting rates closer to actual costs.

GTE is concerned that the significant achievement of the GBT would be undermined by the Commission's proposed prescription of international settlement rates. Disruption of many carefully balanced liberalization commitments seems likely in light of the outcry of opposition sparked by this NPRM. As such, GTE submits that the Commission should reconsider its approach in this matter. It should take advantage of the significant opportunities presented by the GBT and focus its efforts on initiatives that will amplify the additional competitive forces unleashed by this historic agreement. Such action would be in the best interests of both U.S. consumers and carriers.

With such an opportunity present, it may be unwise and even unproductive to adhere to the NPRM's proposed unilateral prescription of settlement rates. Most Commenters express strong opposition to the Commission's proposal which, in effect, dictates to foreign carriers the rates charged for access to their domestic networks. They also establish clearly that the NPRM exceeds the Commission's jurisdiction under the Communications Act and contravenes U.S. international treaty obligations regarding sovereignty, mutuality and negotiation. Most importantly, it may incite other regulatory bodies around the world to take similar preemptive actions, conceivably resulting in substantial conflict and possible rejection of many GBT commitments.

In addition to the jurisdictional and legal shortcomings, the specific methodology proposed by the Commission is fatally flawed on economic and substantive grounds. The majority of commenters are concerned about the Commission's overly narrow and misplaced focus on settlement rates, the inadequacy of the Commission's proposed classification of countries, the Commission's lack of cost data, and the inappropriateness of basing settlement rates on Total Service Long Run Incremental Cost ("TSLRIC") or Tariffed Components Price ("TCP"). These flaws suggest that the Commission should revise its approach to promoting competition-based settlement rates.

Furthermore, the comments clearly establish developing countries' need for transition periods longer than those proposed in the NPRM. More reasonable transition periods are needed by developing countries to accommodate the introduction of competition and the delicate task of rebalancing rates. The record reveals a myriad of considerations that mandate a country-specific analysis to tailor transition periods to particular needs of developing countries.

GTE respectfully submits that the Commission should revise its approach to feature non-binding benchmarks and more reasonable transition periods. This would allow the Commission to continue to exert a global leadership role by promoting competition through international organizations such as the WTO and the International Telecommunication Union ("ITU"). It would be consistent with the Commission's domestic jurisdiction, U.S. obligations under the ITU treaties and other countries commitments under the GBT. Moreover, it would maximize the chances of achieving lower settlement rates in a manner compatible with the international community.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 96-261
International Settlement Rates	)	

REPLY COMMENTS OF
GTE SERVICE CORPORATION

I. INTRODUCTION

GTE Service Corporation, on behalf of its affiliated telecommunications companies (collectively "GTE"), and through its attorneys, herein replies to the comments filed in the above-captioned proceeding. The Commission's Notice of Proposed Rule Making ("NPRM") has provoked an outcry of opposition from governments and international telecommunications providers. Indeed, the filing of comments by more than seventy entities clearly reflects the interest and profound concern sparked by the Commission's proposals. Even more importantly, the context in which the NPRM was published has been substantially changed by an intervening landmark international telecommunications trade agreement. GTE respectfully submits that both the overwhelming opposition to the NPRM and the changing nature of the international telecommunications environment warrant the Commission's reevaluation of its proposed prescription of settlement rates.

The World Trade Organization's ("WTO") global basic telecommunications agreement ("GBT") dramatically alters the telecommunications landscape worldwide. Designed to liberalize trade and investment in basic telecommunications, this historic and pervasive agreement involves nearly seventy countries and 95% of the world's telecommunications

revenue. It embodies fundamental changes and commitments that assure an acceleration and expansion of competitive forces. As such, the GBT reinforces the nearly universal view among Commenters that reliance on increasingly competitive telecommunications markets and bilateral or multilateral negotiations will produce cost-oriented settlement rates more efficiently than the unilateral proposals in the NPRM. Section II of these reply comments discusses why, in light of the GBT, the NPRM's prescriptive proposal is unnecessary and unwise.

Section III reviews the substantial record opposition to the proposed unilateral prescription of settlement rates. Most Commenters conclude correctly that the NPRM violates U.S. international treaty obligations. They also establish clearly that the NPRM's attempt to dictate the rates foreign carriers charge for access to their domestic networks is beyond the Commission's jurisdiction under the Communications Act.

Ensuing sections discuss various other concerns with the Commission's benchmark proposal, including:

- the Commission's overly narrow and misplaced focus on settlement rates to benefit U.S. consumers, rather than the myriad of factors affecting the U.S. net settlement outpayment and the manner in which collection rates will be reduced (Section IV);
- the substantial flaws in the Commission's benchmark methodology (Section V);
- the lack of justification for the Commission to prescribe settlement rates to prevent hypothetical anti-competitive behavior (Section VI); and
- the need for longer transition periods for developing countries (Section VII).

In view of the conclusion of the GBT and the significant opposition worldwide to the NPRM's prescriptive approach, the Commission should abandon its proposed prescription of international settlement rates. If it proceeds with new benchmarks, it should adopt transition times compatible with the WTO commitments of developing countries, thereby promoting,

rather than impeding, the liberalization, privatization, and competition in those markets that will most effectively reduce accounting rates.

II. IN LIGHT OF THE RECENT CONCLUSION OF THE GLOBAL BASIC TELECOMMUNICATIONS AGREEMENT, IT IS UNNECESSARY AND UNWISE FOR THE COMMISSION TO PRESCRIBE INTERNATIONAL SETTLEMENT RATES.

WTO members announced the GBT on February 15, 1997.[1] The GBT demonstrates the world's dedication to an ever-broader competitive environment for international telecommunications and accounting rate reform.[2] The GBT will foster higher levels of competition in the international telecommunications environment and accelerate the current trend toward market-based rates for transporting or terminating international traffic.[3] It will also create a more positive context in which U.S. international long-distance carriers will negotiate lower prices for such network services.

---

[1] The GBT will enter into force internationally on January 1, 1998, pending ratification by the current signatories and any countries that may accede to the agreement by the end of November 1997.

[2] Nearly seventy countries made GBT commitments that, among other things, open most telecommunications sectors to foreign competition and authorize foreign entities to own and control telecommunications services and facilities. In terms of market share, the agreement covers countries and traffic accounting for 95% of basic telecommunications. Statement of Amb. Charlene Barshefsky, U.S. Trade Representative, Basic Telecom Negotiations, February 15, 1997.

[3] A noteworthy example of an innovative competitive approach for international telecommunications is the announcement on March 24, 1997 of one company's plans to offer telephony services over the Internet. Prices for such service are expected to be 80 to 90 percent cheaper than traditional international telephony service. As a result, this Internet approach to international telecommunications is likely to have a dramatic impact on the accounting rate system. Indeed, an OECD official was quoted as hailing this as the possible "big bang" that will put global pressure on accounting rates. See Wall Street Journal Europe, p.3, March 24, 1997

In light of this dramatic event, the Commission should heed the advice of numerous Commenters and focus its efforts on initiatives that will amplify the additional competitive forces unleashed by this historic agreement to achieve international accounting rates closer to actual costs.[4] GTE submits that attempting to impose such rate reductions according to a unilateral, bureaucratic model will impede rather than accelerate the broader goals the Commission and the U.S. Government worked so hard to achieve in the GBT. The proposed FCC action would run against the grain of cooperative bilateral relationships evidenced by the agreement.

Prescription of international settlement rates following the conclusion of the GBT would be both unwise and counterproductive. Foreign countries will certainly resent any U.S. unilateral action that would undermine their GBT commitments. Indeed, the Commission's proposed action may cause some countries to decline to ratify their commitments or to challenge the rules adopted by the Commission as incompatible with the General Agreement on Trade in Services obligations under the WTO. Adopting such an aggressively unilateral approach can also be expected to deter GBT signatories from improving their offers before the November 1997 deadline and may persuade others not to join the GBT regime.[5]

---

[4] See, e.g., Comments of British Embassy ("British Embassy") at 1; Comments of Sprint Communications Co., L.P. ("Sprint") at 2-3; Comments of Deutsche Telekom, AG ("Deutsche Telekom") at 3; Comments of France Telecom ("France Telecom") at 5; Comments of Telefonos de Mexico ("Telefonos de Mexico") at 7; Comments of Compania Telefonos de Chile at 6-7; Comments of Portugal Telecom International ("Portugal Telecom") at 3-4; Comments of Pacific Bell Communications ("Pacific Bell") at 9-10; Comments of Justice Technology Corporation at 2; Comments of Embassy of Japan ("Embassy of Japan") at 2.

[5] The GBT regime is open to accession until November 30, 1997. Indeed, until that date, countries could withdraw from the GBT. See Fourth Protocol to the General Agreement

(Continued..)

It is also likely that enforcement of the NPRM's abbreviated transition periods would hinder developing countries' compliance with the GBT by limiting their ability to accommodate the complex issues inherent in moving to a competitive environment, such as rebalancing tariffs.[6] The United States, in the GBT, agreed to a timetable for countries to open their markets. Any Commission timetable adopted in this proceeding should consider the GBT commitment dates in setting WTO members' transition periods. Otherwise, the Commission's adoption of its proposed transition periods may disrupt the balance achieved by the WTO in timely reforming the worldwide telecommunications market and may frustrate further multilateral efforts to reach agreement on lower accounting rates.[7]

GTE encourages the Commission to exercise its leadership by promoting the timely implementation of the GBT's competitive market principles.[8] The WTO and the International Telecommunication Union ("ITU") provide appropriate international fora for the U.S. to foster the continuing expansion of competition and to seek further reductions in settlement rates.[9]

(...Continued)
on Trade in Services, WTO Doc. S/L/20, 96-1750 (April 30, 1996).

[6] For GTE's discussion of the likely effect of transition periods on developing countries' ability to implement their liberalization plans see, Section VII, infra, at 28-32.

[7] See Comments of Hong Kong Telecom International ("Hong Kong Telecom") at 28-29; Dr. Pekka Tarjanne, ITU Secretary-General, letter to Amb. McCann (February 21, 1997).

[8] See Deutsche Telekom at ii (advocating that the Commission continue to promote efforts to liberalize the international telecommunications market); Pacific Bell at 9 (recommending that the FCC promote the rapid infusion of competition in the U.S. IMTS market).

[9] Indeed, Dr. Pekka Tarjanne, the Secretary-General of the ITU, noted in a recent letter
(Continued...)

III. THE NPRM EXCEEDS THE COMMISSION'S JURISDICTION AND VIOLATES INTERNATIONAL TREATIES.

The overwhelming majority of Commenters question or reject the Commission's legal authority to implement the NPRM. Most Commenters consider the NPRM's enforcement provisions to exceed the Commission's jurisdiction under the Communications Act by effectively dictating the rates foreign carriers may charge for access to their domestic networks.[10] Several Commenters, including at least one otherwise supportive of the Commission's approach, observe that the NPRM fails to discuss the Commission's rationale for such a dramatic departure from its practice, to date, of not seeking to prescribe international accounting rates directly.[11]

There is virtual unanimity of opinion that the unilateral imposition and enforcement of the NPRM's mandatory accounting rate benchmarks would violate the ITU Constitution, Convention and Regulations (the "ITU Treaties"), which the Commission has acknowledged

---

(...Continued)
to Amb. McCann the willingness of a number of countries to move forward in a multilateral way to achieve cost-oriented accounting rates. However, he expressed concern that the Commission's final decision in this NPRM "not threaten the viability of efforts carried out in our organization in this respect." He also cited the excellent results of the WTO negotiations, which, he is convinced, provide an additional opportunity to consolidate the process of market reform in the communications sector. Dr. Pekka Tarjanne, ITU Secretary-General, letter to Amb. McCann (February 21, 1997).

[10] Comments of Cable & Wireless, PLC ("C&W") at 5-6; Comments of Kokusai Denshin Denwa Co. Ltd. ("KDD") at 4; Portugal Telecom at 6-7; Comments of Telecommunicaciones Internacionales de Argentina Telintar S.A. ("Argentina Telintar") at 24-29.

[11] Pacific Bell at 6; Sprint at 4; Argentina Telintar at 24.

are binding on the United States. Commenters also consider the NPRM inconsistent with nonbinding ITU Recommendations that the United States was instrumental in drafting.

A. The Commission Lacks Jurisdiction Under The Communications Act To Set Rates For Foreign Carriers.

1. The NPRM Is Aimed Directly At Foreign Carriers; The Effects On Those Carriers Would Not Be Merely Incidental To Legitimate Exercise Of The Commission's Authority.

The Communications Act does not grant the Commission authority to prescribe the rates foreign carriers may charge for access to or use of their domestic telecommunications networks. However, that is precisely what the Commission seeks to do by unilaterally prescribing settlement rates.

Apparently recognizing that it has no direct authority over foreign carriers, the Commission contends that the NPRM's sanctions would be addressed exclusively to U.S. carriers.[12] This contention, however, is contradicted by the Commission's own statements regarding the purpose and objective of the NPRM - to compel foreign carriers to agree to reduce settlement rates to levels that the Commission has unilaterally determined to be cost-based. The NPRM expressly focuses on "foreign carriers that have failed to make meaningful progress toward complying with our benchmarks;"[13] on "foreign carriers [that] fail to respond" to NPRM-based accounting rate proposals;[14] and on "[t]he objective of ...

---

12 NPRM ¶¶ 19, 89

13 Id. ¶ 88 (emphasis supplied).

14 Id. ¶ 89 (emphasis supplied).

attain[ing] reform in the international accounting rate system."[15] The Commission further acknowledges that enforcement of the NPRM would "require substantial adjustments for many countries. . . ."[16] The principal objective of the NPRM is clearly to change the behavior of foreign carriers, not U.S. carriers or U.S. consumers.

This puts the NPRM in a completely different posture from the regulations upheld by the District Court in RCA,[17] which was cited by the Commission and certain supportive Commenters. In RCA, the Commission's regulations were intended to circumscribe the rates U.S. carriers could charge U.S. consumers, an objective clearly within the Commission's statutory mission and competence.[18] Under the NPRM, the Commission's purpose is to establish rates that may be charged by foreign correspondents; there is no clear nexus to the relationship between U.S. carriers and U.S. consumers. The NPRM does not ensure that U.S. consumers benefit from reduced settlement payments; U.S. consumers would be the incidental

---

[15] Id. ¶ 98 (emphasis supplied). AT&T is under no illusion about the actual target of the NPRM, recommending that "[a]ll foreign carriers should begin an immediate transition towards their new benchmark rates within 30 days of the Commission's Order." Comments of AT&T ("AT&T") at 2 (emphasis supplied). AT&T appears to understand that the effect of the NPRM will be for the Commission to "order" foreign carriers to move to "their" new benchmarks, as unilaterally established by the Commission.

[16] NPRM ¶ 25.

[17] RCA Communications Inc. v. United States, 43 F. Supp. 851 (S.D.N.Y. 1942).

[18] As noted in GTE's initial comments, the regulations contested in RCA were not directed at what U.S. carriers could charge or pay their foreign correspondents, but what they could charge U.S. customers. The RCA court clearly stated that U.S. carriers could choose to comply with both the Commission's rate setting regulation and the carriers' pre-existing international accounting rate agreements by absorbing the losses implicit in paying foreign correspondents more than could be collected from U.S. customers. RCA at 855. The enforcement provisions of the NPRM would not permit U.S. carriers this option.

beneficiaries of the Commission's proposals (if they benefit at all).[19] Accordingly, RCA cannot fairly be cited as authority for the enforcement proposals of the NPRM.[20]

2. Foreign Carriers Are Beyond The Commission's Jurisdiction.

Although the Commission has not contended that it has direct jurisdiction over foreign carriers, AT&T appears willing to make that argument [21] AT&T suggests that the Commission has direct authority over foreign carriers under sections 201-205 of the Communications Act, based on a dictum in the Commission's 1979 decision in Western Union.[22] The Commission, however, decided Western Union on other grounds and did not adopt the position now being urged by AT&T.[23] Under AT&T's reading of the dictum, the

---

[19] U.S. collection rates have not declined in proportion to accounting rate reductions. Instead, average revenue retention by U.S. carriers has increased. See C&W at 18-20 (comparing settlement rates to retained revenue and noting that "growth in settlement payments has been dwarfed by the growth in revenue retention by U.S. carriers."); Pacific Bell at 4-5 & n.12 (noting that "U.S. carriers retain nearly two thirds of the revenues collected" from calls to Western Europe); see also Section IV (A), infra, (discussing the probable lack of benefit to U.S. consumers from the Commission's proposed prescription of settlement rates).

[20] See C&W at 8. ("[The NPRM] is quite a different legal proposition than that articulated by RCA Communications."); Argentina Telintar at 29. Moreover, as noted in GTE's initial comments, RCA was decided in a critically different legal setting. Whereas the United States was not party to or bound by the particular telegraph regulations disputed in RCA, RCA at 855, it is party to the ITU Treaties, which are violated by the enforcement provisions of the NPRM.

[21] AT&T at 56.

[22] Id. (citing Western Union Telegraph Co., 75 F.C.C.2d 461, 476 (1979)).

[23] The sentence in Western Union immediately following the language quoted by AT&T states: "[The Commission does] not regard such statutory parsing to be determinative." Western Union at 476. Moreover, in Western Union, the Commission clearly acknowledged that rates and tariffs set by foreign carriers are not within the control of U.S. entities and could be changed "at the option" of the foreign carriers. Western Union at 477.

Commission could declare unreasonable and unlawful any charge, practice, classification or regulation of any foreign carrier merely by virtue of that carrier's physical interconnection with carriers subject to FCC jurisdiction.[24] This result would be both irrational and in direct contradiction of section 2(b)(2) of the Communications Act. Indeed, the Commission has recognized repeatedly that foreign carriers, including the foreign correspondents of U.S. carriers, are beyond the Commission's jurisdiction.[25]

3. The Commission Has Not Articulated Any Basis For Its Assertion Of Jurisdiction.

As GTE pointed out in its initial comments, the Commission has failed to establish a legal basis under the Communications Act for asserting jurisdiction to enforce the NPRM's accounting rate benchmarks. Numerous other Commenters have also observed that the NPRM's conclusory listing of sections of the Act is a wholly insufficient discussion of a crucial issue. Given the past comments of the National Telecommunications and Information Administration ("NTIA"), including the 1990 observation that "international settlements

---

[24] See also C&W at 8 ("If [it could set foreign carriers' rates], the FCC would have rate jurisdiction over all entities that provide a service or asset to a carrier that is calculated as part of the carrier's revenue requirement."). Moreover, any claim of broad unilateral jurisdiction by the Commission would be met with equivalent claims by other national regulators, a situation the United States would never accept.

[25] See, e.g., AT&T Co. et al., 88 F.C.C.2d 1630, 1640 (1982) (referring to the limitations on FCC jurisdiction over facilities "jointly owned by United States interests and their foreign correspondents who are beyond our jurisdiction.")(emphasis supplied); Uniform Settlement Rates, etc., 84 F.C.C.2d 121, 122 (1980) ("our jurisdiction over international services applies only to one end of the service. Authority over the foreign end resides in the particular foreign correspondent.") (emphasis supplied); International Communications Policies Governing Designation of Recognized Private Operating Agencies, 95 F.C.C.2d 627, ¶ 55 (1983) ("Because international communications are a cooperative venture, no one participant could, or would presume to, dictate policies to other sovereigns.").

involve certain issues that go beyond [the Commission's] jurisdiction,"[26] the Commission could not have been unaware of the doubts about its legal jurisdiction when it drafted the NPRM.

GTE reiterates its view that the Commission owes the public a detailed discussion, ab initio, of its asserted jurisdiction unilaterally to establish and enforce international accounting rates. Even Sprint Communications Co., L.P. ("Sprint"), which contends such jurisdiction may exist, acknowledges the importance of articulating a basis for prescribing or enforcing actual settlement rates, as would occur under the NPRM.[27]

As noted in the initial round of comments by GTE, among others, the Commission bears the burden of demonstrating in detail its theory of its own jurisdiction.[28] The NPRM is procedurally flawed in its failure even to discuss the issue, especially when the policy enunciated in the NPRM represents a dramatic and unexplained departure from the

---

[26] Comments of NTIA, Regulation of Int'l Acctg. Rates, CC Docket No. 90-337 at 21 (filed Oct. 15, 1990); see also id. at 16 ("For international telecommunications services, the Commission's jurisdiction applies only to the U.S. end of the service.") and 17 ("Foreign governments and their telecommunications administrations . . . maintain independent sovereign authority over the foreign end of a call."); Reply Comments of NTIA, Regulation of Int'l Acctg. Rates, CC Docket 90-337, Phase II, at 7 (Sept. 27, 1991) ("The Commission's jurisdiction over international telecommunications services applies only to the U.S. end of a service, and the Commission cannot compel foreign entities to accept accounting rates prescribed by the Commission for U.S. carriers.").

[27] Sprint at 4-5 ("[I]f the Commission decides to adopt its benchmarks to impose an interim settlement arrangement or to prescribe an actual settlement rate, it would be important for the Commission to discuss more fully its jurisdiction to accomplish this."), and at 4 ("At least one of the enforcement mechanisms [in the NPRM] would appear to be a prescription under section 205 of the Communications Act.").

[28] GTE at A-12 and n.34; KDD at 7, n.7. There is a presumption against the extraterritorial application of U.S. laws that the Commission has not even begun to meet.

Commission's past restraint in this area.[29] This procedural inadequacy is even more apparent where the NPRM's enforcement provisions appear, on their face, to violate U.S. treaty obligations and exceed agency authority under the Communications Act.

B. The NPRM Violates Binding Obligations Under The ITU Treaties.

The vast majority of Commenters conclude that the NPRM would violate U.S. international treaty obligations under the ITU Treaties.[30] In particular, the Commission's proposals run afoul of article 6.2.1 of the ITU Telecommunication Regulations, which prescribes that international accounting rate agreements be arrived at and revised "by mutual agreement" between carriers, as well as numerous other ITU Treaty provisions that expressly impose the obligations of sovereignty, mutuality and negotiation upon the U.S. and other signatories.[31]

---

[29] See Bush-Quayle '92 Primary Committee, Inc. v. Federal Election Comm'n, 1997 U.S. App. Lexis 501 (D.C. Cir. 1997) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line..." (quoting Greater Boston Tel. Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.) cert. den'd 403 U.S. 923)).

[30] See, e.g., GTE; C&W; Comments of Caribbean Assoc. of Nat'l Telecom. Orgs. ("CANTO"); Hong Kong Telecom; KDD; Comments of Int'l Telecom Japan, Inc.; Comments of Republic of Panama ("Panama").

[31] While these Reply Comments focus on article 6.2.1 of the ITU Regulations, the ITU Treaties are replete with provisions underscoring the mutuality and sovereignty that form the basis of international telecommunications operations and agreements. See GTE at A-4 - A-7; see, e.g., ITU Constitution art. I.2.F (Geneva, 1992, as amended, Kyoto, 1994); International Telecommunication Convention, art 4.2.E (Nairobi, 1982) (recognizing that accounting rates must be established through "collaboration among [ITU] Members," and "taking into account the necessity for maintaining independent financial administration of telecommunication"); ITU Constitution art. 56 (Geneva, 1992, as amended, Kyoto, 1994) (providing for settlement

(Continued...)

Out of all the Commenters, only AT&T attempts to rationalize the NPRM's manifest inconsistency with the ITU Treaties. All of AT&T's arguments, however, fail to overcome the plain meaning of article 6.2.1 of the ITU Telecommunications Regulations:

> For each applicable service in a given relation, administrations . . . shall by mutual agreement establish and revise accounting rates to be applied by them . . . .[32]

This binding treaty obligation plainly requires that accounting rates be established in negotiations between carriers, not by unilateral prescription of any one national regulator. As noted above and in GTE's initial comments, the enforcement provisions of the NPRM would violate this requirement by unilaterally dictating rates to foreign carriers. The NPRM is also inconsistent with ITU-T Recommendation D.140 and other relevant authorities. The Commission cannot arrogate to itself either the determination of foreign carriers' costs on how much those carriers will be permitted to charge for access to and use of their domestic networks.

(...Continued)
of disputes "through diplomatic channels, or according to procedures established by bilateral or multilateral treaty" or other mutually agreed upon method between the parties); ITU-T Recommendation D.140 Annex C.2.3 and C.2.4 (prescribing that administrations should "as far as possible, agree on the approach to be used," in establishing accounting rates, and prescribing a number of specific factors that should be taken into account in so doing); id. at para. C.3.1.1 (prescribing that in negotiating accounting rates, each party should "independently conduct its own cost study using its own cost model").

The NTIA repeatedly has questioned the jurisdiction and authority of the Commission to dictate international accounting rates in light of United States treaty obligations and principles of international sovereignty. Reply Comments of NTIA, Regulation of Int'l Acctg. Rates, CC Docket No. 90-337, Phase II, at 7; Comments of NTIA, Regulation of Int'l Acctg. Rates, CC Docket No. 90-337 at ii, 16, 17, 21-22.

[32] ITU Regulations at art. 6.2.1. (emphasis supplied).

AT&T acknowledges that the ITU Treaties are legally binding on the United States and its carriers,[33] but contends that the Treaties do not "deprive the Commission of authority to regulate international accounting rates."[34] AT&T is correct that, construed properly, the Commission's jurisdiction under the Communications Act is consistent with the mutuality requirement of the ITU Treaties.[35] As GTE observed in its earlier comments, the Commission's jurisdiction over international accounting rates is different from and more limited than its jurisdiction over domestic rates and charges;[36] thus, there is no conflict. The Treaties do not deprive the Commission of authority that was never granted by Congress.

Elsewhere in its comments, AT&T acknowledges that article 6.2.1 of the ITU Regulations envisions that accounting rates will be arrived at by "private inter-carrier negotiations,"[37] but argues that the requirement to "tak[e] into account . . . relevant cost trends" somehow exonerates the Commission of its violation of the mutuality requirement. GTE agrees that carriers negotiating mutually acceptable accounting rates must take cost trends

---

[33] AT&T at 56.

[34] Id. at 57.

[35] If it had been inconsistent, the Commission presumably would not have supported Senate advice and consent to ratification of the ITU Treaties. See Letter of Submittal from the Secy. of State, July 15, 1996, ITU Constitution and Convention, S. Treaty Doc. No. 34 at XI. 104th Cong., 1st Sess. (1996) (noting the concurrence of the Commission in Secy. Christopher's recommendation of ratification). As an aside, GTE notes that, under U.S. practice, a subsequently ratified treaty of the United States takes precedence over even a prior federal law in the event of a conflict. Restatement (Third) of Foreign Relations § 115.2, cmt. C (1987). This is not an issue here, however, as only the enforcement provisions of the NPRM would violate the ITU Treaties.

[36] GTE at A-12, A-15 - A-17.

[37] AT&T at 57.

into account. Carriers must also conform to Appendix 1 to the Regulations, which reiterates the requirement of mutual agreement, and they must take into account "relevant CCITT [now ITU-T] Recommendations," including ITU-T Recommendation D.140. Recommendation D.140 clearly contemplates that, in conducting negotiations, each party will "conduct its own cost study using its own cost model to determine . . . its transmission, switching and national extension costs."[38]

The NPRM does not contend that foreign carriers are ignoring relevant cost trends or otherwise violating article 6.2.1 of the ITU Regulations when negotiating accounting rate agreements. Thus, AT&T's argument seems irrelevant. Moreover, as GTE noted in its initial comments, if there were a dispute over compliance with article 6.2.1, the ITU Treaties contain binding provisions for dispute resolution. Unilateral "self-help" and pre-adjudication retaliation are not among the options.[39]

AT&T further argues that the United States agreed to the ITU Regulations only to the extent they comport with the United States' view of its own interests.[40] The statement cited by AT&T in support of this proposition, however, was not included in the Regulations

---

[38] ITU-T Recommendation D.140, annex C.3.1.1. (Sept. 1995). As previously noted, the Commission's proposal presumes (without adequate data) to establish other countries' costs and then prescribes settlement rates based on those FCC-determined costs.

[39] See GTE at A-4 - A-5 (citing article 56.2 of the ITU Constitution).

[40] AT&T at 57 ("[I]n acceding to the ITU [Regulations of 1988 the United States] specifically 'reserve[d] its right to take whatever action it deems necessary, at any time, to protect its interest.'"). AT&T bases this position on, and partially quotes, the signing statement of the United States on the 1988 (Melbourne) ITU Regulations, Statement No. 69 reprinted in S. Treaty Doc. No. 102-13 at 76 (1991).

transmitted to the U.S. Senate for ratification and subsequently ratified.[41] Accordingly, it is simply not part of the legal context in which the Commission should interpret the Regulations or U.S. obligations thereunder.

The ITU Treaties are clear and binding on the United States, its agencies and its nationals. The enforcement proposals of the NPRM would violate the ITU Treaties. Nothing offered by AT&T obviates that fundamental problem, which the NPRM fails even to address.

C. The NPRM Is Inconsistent With MFN Obligations Under The GBT

Numerous Commenters have echoed GTE's concerns about the consistency of the NPRM with the "most favored nation" ("MFN") provisions of the GBT.[42] The United States "offer" in the GBT did not, with one minor exception, contain a derogation from MFN.[43] Accordingly, all of the MFN concerns GTE and other Commenters raised in their initial

---

[41] See Letter of Submittal from Secy. of State Lawrence S. Eagleberger at v, x, xi, July 15, 1991, International Telecommunication Regulations (Melbourne, 1988) (transmitting the ITU Telecommunication Regulations and Statement No. 39 to U.S. Senate for ratification, but transmitting Statement No. 69 for information purposes only, because Statement No. 69 "does not require ratification by the United States," due to its irrelevance); see also 138 Cong. Rec. S. 11762 (daily ed. Aug. 2, 1992) (ratifying the ITU Telecommunication Regulations with "a" U.S. Reservation, i.e., No. 39); id. at 11763 (statement of Sen. Pell) (noting that the Treaty adopted contains "one reservation, understanding, and declaration," i.e., No. 39).

[42] See, e.g., Argentina Telintar at 19-21, Comments of Chunghwa Telecom ("Chunghwa Telecom") at 2; Comments of European Union, Delegation of the European Commission at 1; France Telecom at 15; Embassy of Japan at 4; KDD at 24-26; Comments of Republic of Poland, Min. of Communications ("Poland") at 1; Comments of Telecom Italia ("Telecom Italia") at 7-8.

[43] Even the one exception – relating to one-way satellite transmissions for DTH and DBS television – may be challenged by the European Union and Canada as a violation of commitments previously made during the Uruguay Round. See Inside U.S. Trade at 1 (Feb. 18, 1997).

comments must now be addressed by the Commission, in the context of an international agreement expected to enter into force in January 1998

As stated in GTE's initial comments, the NPRM's proposed establishment of three categories of countries, three accounting rate benchmark ranges and three transition periods will result in different WTO members being treated differently, in probable violation of MFN.

As also noted in GTE's initial comments, the proposal to deny Section 214 authorizations to affiliates of foreign carriers not meeting the NPRM benchmarks appears overwhelmingly likely to be an MFN-inconsistent condition on access to the U.S. market. Any attempt by the Commission to characterize such Section 214 denials as MFN-neutral conditions on the terms of services would be highly unlikely to survive scrutiny in the WTO. The practical effect of such conditions is to deny access to the U.S. market. In view of the number of foreign Commenters -- including both governments and carriers -- disputing the NPRM's consistency with the GBT, a WTO challenge appears inevitable. Therefore, the Commission should ensure that any action it adopts in this proceeding is consistent with MFN

IV. TO BENEFIT U.S. CONSUMERS, THE COMMISSION SHOULD CONSIDER THE COMPLEX RELATIONSHIP AMONG COLLECTION RATES, TRAFFIC FLOWS AND NET SETTLEMENTS, RATHER THAN FOCUSING SOLELY ON SETTLEMENT RATES

The NPRM focuses exclusively on settlement rates as the cause of the U.S. net settlements outpayment[44] and as the perceived barrier to lower collection rates. In doing so,

---

[44] According to the Commission, the U.S. net settlements outpayment approximates five billion dollars yearly. NPRM ¶ 8. This amount presents a partial and somewhat misleading picture because it includes U.S. settlement payments generated by persons overseas using "call-back" services. While such calls contribute to the U.S. net settlements imbalance, they (Continued...)

the Commission fails to articulate clearly and consistently the public interest it is advancing and how its proposed action will achieve its goals.[45] It is GTE's understanding that the Commission seeks to prescribe benchmark settlement rates to reduce the U.S. net settlements outpayment and to benefit U.S. consumers through lower collection rates. As various parties emphasize, however, the Commission's narrow focus on settlement rates does not assure significant benefit to U.S. consumers.

A. Prescribing Lower Settlement Rates Will Not Necessarily Benefit U.S. Consumers.

Prescribing lower settlement rates will not necessarily benefit U.S. consumers. U.S consumers benefit directly from lower U.S. collection rates but they benefit from lower settlement rates only if the U.S. carrier passes on its savings. As noted in the comments, however, the Commission has failed to identify any significant correlation between its proposed settlement rates and lower collection rate levels.[46] Some Commenters and studies

---

(...Continued)
clearly represent a substantial net benefit to U.S. carriers and the U.S. balance of trade. As C&W aptly noted, "[w]here the customer is a foreign national, the resulting accounting rate outpayments are, generally, more than offset by the foreign currency revenues paid either the U.S. underlying carrier or the U.S. service provider. Where the customer is a U.S. national calling from overseas, the resulting outpayment represents a foreign currency savings on what the customer would have paid for an ordinary international direct dial call. In both cases, the U.S. is a net beneficiary." C&W at 23-24, n. 56.

[45] C&W at 26.

[46] E.g., C&W at 18 (stating that the NPRM does not explain the basis for its assumption that there is a direct and significant relationship between what U.S. consumers pay for IMTS and the charges U.S. carriers pay foreign carriers for terminating U.S. traffic); France Telecom at 6 (noting the NPRM's lack of a mechanism to ensure U.S. carriers pass on cost savings to their customers).

even conclude that no such direct relationship exists.[47]

The fact is, average collection rates have been increasing over time, whereas settlement rates have been dropping.[48] Even the Commission admits that U.S. collection rates have not declined in relation to accounting rate reductions.[49] Several substantive examples prove that settlement rates do not correspond to U.S. collection rates. For example, Telecom Italia reduced its accounting rate approximately 80 percent over the past four years. However, prices for telephone calls to Italy have not reflected this substantial cost savings.[50] As the Commission is aware, the accounting rate between Hong Kong and the U.S. declined by 57 percent over the last five years, yet, the average consumer rates charged by AT&T for calls to Hong Kong increased a number of times in the same period.[51]

As such, there is no evidence that the Commission's proposed prescription of settlement rates will lower U.S. collection rates or benefit U.S. customers.[52] Accordingly,

---

47 KDD at 9-10 (citing to Kenneth B. Stanley, "Balance of Payments, Deficits, and Subsidies in International Communications Services: A New Challenge to Regulation," 43 Administrative Law Review 411, 426-27 (Summer 1991)); Hong Kong Telecom at 16 ("[T]here is no direct or automatic relationship between reductions in accounting rates and corresponding decreases in U.S. international collection rates.").

48 Pacific Bell at 4-5; C&W at 18-19.

49 NPRM ¶ 27.

50 Telecom Italia at 4.

51 Hong Kong Telecom at 11; C&W at 19; NPRM ¶ 12 & n.15.

52 It is interesting to observe that, despite successfully negotiating lower settlement rates to the Dominican Republic, AT&T's average revenue per minute for calls to the Dominican Republic has increased. See GTE at 8, n.12.